

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSE ANTONIO HERNANDEZ,

Petitioner,

v.

JAMES E. TILTON, Director,
Department of Corrections,

Respondent.

No. C 07-3778 MMC (PR)

**ORDER TO SHOW CAUSE;
GRANTING LEAVE TO PROCEED
IN FORMA PAUPERIS**

(Docket Nos. 2 & 4)

On July 23, 2007, petitioner, a California prisoner incarcerated at North Kern State Prison and proceeding pro se, filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner seeks leave to proceed in forma pauperis.

BACKGROUND

In 2005, in the Superior Court of Monterey County, petitioner was found guilty of attempted murder, exhibiting a deadly weapon to resist arrest, assault on a peace officer, and being a felon in possession of a firearm. He was sentenced to a term of forty-three years to life in state prison. The California Court of Appeal affirmed, and the California Supreme Court denied the petition for review. Petitioner did not seek state habeas corpus relief.

DISCUSSION

This Court may entertain a petition for a writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975). A district court shall “award the writ or issue an

order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the petition are vague or conclusory, palpably incredible, or patently frivolous or false. See Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990) (quoting Blackledge v. Allison, 431 U.S. 63, 75-76 (1977)).

Petitioner claims his conviction for attempted murder was based on insufficient evidence, in violation of due process. Liberally construed, petitioner’s claim is cognizable.

CONCLUSION

For the reasons stated above, the Court orders as follows:

1. The Clerk of the Court shall serve by certified mail a copy of this order and the petition, along with all attachments thereto, upon respondent and respondent’s attorney, the Attorney General for the State of California.¹ The Clerk shall also serve a copy of this order on petitioner.

2. Respondent shall file with the Court and serve on petitioner, within **ninety (90)** days of the date this order is filed, an answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be granted based on petitioner’s cognizable claims. Respondent shall file with the answer and serve on petitioner a copy of all portions of the state trial record that have been transcribed previously and that are relevant to a determination of the issues presented by the petition.

¹Petitioner has named as respondent James E. Tilton, Director of the California Department of Corrections. The rules governing relief under 28 U.S.C. § 2254 require a person in custody pursuant to the judgment of a state court to name the “state officer having custody” of him as the respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (quoting Rule 2(a) of the Rules Governing Habeas Corpus Cases Under Section § 2254). While the warden of the institution in which the petitioner is incarcerated is the typical respondent, the “state officer having custody” also may include “the chief officer in charge of state penal institutions.” Id. (quoting Rule 2(a) advisory committee’s note). In California, the Director of Corrections may be named as the respondent, without destroying the federal court’s personal jurisdiction over the petition. See id. at 895, 96.

If petitioner wishes to respond to the answer, he shall do so by filing a traverse with the Court and serving it on respondent within **thirty (30)** days of the date the answer is filed.

3. In lieu of an answer, respondent may file, within **ninety (90)** days of the date this order is filed, a motion to dismiss on procedural grounds, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section 2254 Cases. If respondent files such a motion, petitioner shall file with the Court and serve on respondent an opposition or statement of non-opposition within **thirty (30)** days of the date the motion is filed, and respondent shall file with the Court and serve on petitioner a reply within **fifteen (15)** days of the date any opposition is filed.

4. Petitioner is reminded that all communications with the Court must be served on respondent by mailing a true copy of the document to respondent's counsel.

5. It is petitioner's responsibility to prosecute this case. Petitioner must keep the Court and respondent informed of any change of address and must comply with the Court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).


6. Upon a showing of good cause, requests for a reasonable extension of time will be granted as long as they are filed on or before the deadline they seek to extend.

7. In light of petitioner's lack of funds, the application to proceed in forma pauperis is hereby GRANTED.

This order terminates Docket Nos. 2 and 4.

IT IS SO ORDERED.

DATED: November 15, 2007


MAKINE M. CHESNEY
United States District Judge